present applicants if, indeed, they are entitled to terminate the agreement as alleged. Finally, should the plaintiffs succeed in their claim and obtain a declaration that the two irrevocable powers of attorney are null and void, it may be argued that the mining agreement and the permit to mine, on which the rights of the present applicants rest, will be void and of no effect. It is, however, open to the applicants in any future proceeding to show that they have no notice of the fraud perpetrated by the attorneys of the plaintiffs. As stated earlier on, before the dispute arose between the plaintiffs and their attorneys, the plaintiffs knew at all material times that the applicants were mining their land under the mining agreement and they did in fact receive tributes as provided for in the said agreement.

Having regard to all the circumstances, in my view, it is fair and equitable that the present application be granted, and that the 10 per cent tribute payable by the applicants to the plaintiffs under the mining agreement be paid into court until final disposal of the suit involving the question of validity and authority of defendant Nos. 1 and 2 to act as attorneys for the two plaintiffs. I also order that pleadings in this case be closed within one month from date hereof, after which, an early date for trial should be fixed by the Senior Assistant Registrar.

Order accordingly.

Solicitors: *Allen & Gledhill; Azam, Malek & Soh; K S. Tan & Co.; Baharuddin, Bernatt, Tan & Kerr.*

KHOO CHIN INN & ANOR. v. RELIANCE ENTERPRISE SDN. BHD. & ORS.

[O.C.J. (Ajaib Singh J.) April 23, 1975]
[Seremban — Civil Suit No. 12 of 1975]

Practice and Procedure — Discontinuance — Leave of the court — R.S.C., 1957, O.26 r.1, O.38 r.20.

Practice and Procedure — Order of court — "Until the final determination of this suit" — Construction.

The second and third defendants applied for an order that the plaintiffs' purported discontinuance of their action against the defendants by notice of discontinuance without leave of the court was in breach of O.26 r.1.

Held: leave of the court for discontinuance of an action is necessary only where a plaintiff after the receipt of defence takes any other proceedings in the action save an interlocutory application.

Cases referred to:-

(1) *Meerut* v. *Lakshmi Chand & Ors.* A.I.R. 1963 Supreme Court 677.

(2) *Tan Kim Leng & Anor.* v. *Chong Boon Eng & Anor.* [1974] 2 M.L.J. 151.

(3) *Fox* v. *Star Newspaper Company* [1898] 1 Q.B. 636.

CIVIL SUIT.

Edgar Joseph Jr. (*K. Gunaretnam* with him) for the applicants.

S. F. Leow for the respondents.

Ajaib Singh J.: This is an application by the second and third defendants for an order that the plaintiffs' purported discontinuance of their action against the defendants by notice of discontinuance without leave of the court is in breach of Order 26 rule 1 of the Rules of the Supreme Court. There is also a prayer for leave to file a counterclaim. The application is made by way of summons-in-chambers and filed together with the summons is an affidavit dated March 7, 1975 affirmed by Mr. K. Gunaretnam solicitor for second and third defendants.

The circumstances leading to the present application are as follows. On January 20, 1975 the plaintiffs issued a writ of summons seeking declarations to the effect that resolutions passed by the first defendant company at its annual general meeting on December 27, 1974 appointing the second and third defendants as directors of the company were *ultra vires* the company, illegal, void and of no effect. The plaintiffs also claimed for an order of injunction restraining the second and third defendants and each of them from acting as directors of the first defendant company. On January 23, 1975 the plaintiffs made an interlocutory application by notice of motion for an order that the second and third defendants be restrained from acting as directors of the first defendant company. This application, however, was not heard at all because before the date set for its hearing had arrived the plaintiffs wholly discontinued their action against the defendants. On February 3, 1975 the plaintiffs, who were entitled to make a requisition for the holding of an extraordinary general meeting under section 144(1) of the Companies Act 1965, convened an extraordinary general meeting of the company to be held on March 6, 1975 under the provisions of section 144(3) of the Companies Act after the directors of the company had failed to proceed to convene the meeting within twenty-one days after the date of the deposit of the requisition by the plaintiffs. The plaintiffs also gave notice of their intention to move resolutions at that meeting for the removal of the second and third defendants as directors of the company and for the reduction of the number of directors to five.

Meanwhile the second and third defendants had filed a joint defence on February 18, 1975 and upon being notified of the convening of the extraordinary general meeting to be held on March 6, 1975 the second and third defendants applied by notice of motion dated February 24, 1975 for an order that the plaintiffs be restrained whether by themselves or by their servants or agents or otherwise from moving any resolution for the removal of the first and second defendants as directors of the company and secondly from moving any resolution that the number of directors of the company be reduced to five. An order in terms of this motion was made by this court on March 4, 1975 and on the same day the plaintiffs promptly filed a notice of discontinuance wholly discontinuing their action against the defendants under Order 70 rule 1 of the Rules of the Supreme Court the Hence this application by the second and third defendants that the discontinuance was in breach of Order 26 rule 1.

The first plaintiff has filed an affidavit with reference to the summons-in-chambers wherein he has alleged that the application by the second and third defendants is bad on the grounds that it is not supported by a proper affidavit affirmed by either of the applicants, that the affidavit affirmed by Mr. K. Gunaretnam does not disclose that he is duly authorised to make the affidavit on behalf of the applicants and that no notice has been given by the applicants of their intention to use any affidavit as is required under Order 38 rule 20 of the Rules of the Supreme

Court. To these preliminary points raised by the first plaintiff Mr. Edgar Joseph for the applicants referred to a supplementary affidavit of Mr. K. Gunaretnam filed on April 21, 1975 wherein Mr. K. Gunaretnam stated that he had been duly authorised by the second and third defendants as their solicitor to affirm his earlier affidavit of March 7, 1975 in support of the summons-in-chambers of even date. As to the point raised by the first plaintiff that no notice had been given by the applicants of their intention to use any affidavit as was required under Order 38 rule 20 of the Rules of the Supreme Court Mr. Edgar Joseph submitted that the mere fact of serving Mr. Gunaretnam's affidavit of March 7 together with the summons-in-chambers was sufficient compliance with Order 38 rule 20 of intention to use the affidavit. He submitted that no form is prescribed under Order 38 rule 20 as to the manner in which notice is to be given and the supplying of the affidavit itself to the plaintiffs should be taken as notice of intention to use the affidavit. Alternatively he submitted that by virtue of Order 70 rule 1 of the Rules of the Supreme Court the affidavit should not be rendered void.

In my view the preliminary points raised by the first plaintiff are somewhat technical and are not of such a nature as to vitiate the proceedings before me. Mr. Gunaretnam's supplementary affidavit cured the defect if there was any that he had no authority to make the affidavit of March 7, on behalf of his clients. After all a solicitor acting for his client must be deemed to have a general authority to affirm affidavits in the matter in which his client is concerned and I cannot see how it can be said that Mr. Gunaretnam had no authority to affirm an affidavit on behalf of his clients. On the question of giving notice of intention to use an affidavit Order 38 rule 20 does not prescribe any form of notice but however informal such notice may be I think it ought to be in writing by virtue of Order 66 rule 1 which states that all notices required by the rules shall be in writing unless expressly authorised by the court or judge to be given orally. As is the usual practice a statement at the foot of any application whether by summons or notice of motion intimating that the application is supported by affidavit of the applicant or some other person is a sufficient compliance with Order 38 rule 20. In the present application there was no such intimation at the foot of the summons-in-chambers nor was there any written notice to the plaintiffs by the applicants of their intention to use the affidavit of Mr. Gunaretnam dated March 7, 1975 in support of their application. However, in the circumstances of this case non-compliance with Order 38 rule 20 was in my view a mere irregularity which did not render the proceedings void.

The main question in issue for my determination is whether the plaintiffs were within their rights in wholly discontinuing their action against the defendants without leave of the court. Under Order 26 rule 1 of the Rules of the Supreme Court a —

"plaintiff may, at any time before receipt of the defendant's defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing, wholly discontinue his action against all or any of the defendants...."

In the present case the plaintiffs had received the defence but they had not taken any other proceeding in the action except for the interlocutory application of January 23, 1975 which did not even come up for a hearing. As stated earlier the plaintiffs had wasted no time in wholly discontinuing their action after the order of March 4, 1975 was made against them and with the discontinuance of the whole action any interlocutory application that may be pending was as good as gone.

Mr. Edgar Joseph submitted that the plaintiffs could not discontinue their action without leave during the pendency of the order of March 4, 1975 which restrained them from moving any resolution for the removal of the second and third defendants as directors of the first defendant company and from moving any resolution that the number of directors of the company be reduced to five. The order of March 4, ends with the words "until the final determination of this suit". Mr. Edger Joseph submitted that a suit could be finally determined only after it has been heard and adjudicated upon and since this had not been done the plaintiffs were precluded from discontinuing their action without leave. He referred to the case of *Jaswant Sugar Mills Ltd. Meerut* v. *Lakshmi Chand and others*[1] and the case of *Tan Kim Leng & Anor.* v. *Chong Boon Eng & Anor.*[2] in support of his contention that a determination of a suit could be effected only by a judicial pronouncement. In the first of the cases cited the Supreme Court of India had occasion to decide on the word "determination" in the context in which it occurs in Article 136 of the Constitution of India which provides for the granting of special leave to appeal from any judgment, decree, determination, sentence or order made by any court or tribunal in India. The Supreme Court held that the —

"expression 'determination'... signifies an effective expression of opinion which ends a controversy or a dispute by some authority to whom it is submitted under a valid law for disposal. The expression 'order' must have also a similar meaning, except that it need not operate to end the dispute. Determination or order must be judicial or quasi-judicial: purely administrative or executive direction is not contemplated to be made the subject-matter of appeal to this court. The essence of the authority of this court being judicial, this court does not exercise administrative or executive powers *i.e.* character of the power conferred upon this court original or appellate, by its constitution being judicial, the determination or order sought to be appealed from must have the character of a judicial adjudication."

In the case of *Tan Kim Leng & Anor.* v. *Chong Boon Eng & Anor.*, Tan Sri Raja Azlan Shah F.J. in delivering his judgment in the Federal Court said that a

"judicial determination of a dispute where substantial questions of mixed fact and law arise is satisfactorily reached only if it be supported by the most cogent reasons that commend themselves to the learned judge."

Mr. Edgar Joseph also referred to the case of *Fox* v. *Star Newspaper Company*[3] in support of his submission. In that case the plaintiff claimed to be nonsuited after the jury had been sworn and the pleadings opened in an action for libel against the defendant company and it was held that the plaintiff could not under the existing rules elect to be nonsuited and that the only way in which the action could be discontinued was by discontinuance under Order 26 rule 1 by leave of the court. In the course of his judgment in the Court of Appeal Chitty L.J. referring to rule 1 of Order 26 said that the —

"principle of the rule is plain. It is that after the proceedings have reached a certain stage plaintiff, who has brought

his adversary into court, shall not be able to escape by a side door and avoid the contest. He is then to be no longer *dominus litis*, and it is for the judge to say whether the action shall be discontinued or not and upon what terms.... The substance of the provision is that, after a stage of the action has been reached at which the adversaries are meeting face to face, it shall only be in the discretion of the judge whether the plaintiff shall be allowed to withdraw from the action so as to retain the right of bringing another action for the same subject-matter."

Mr. S. F. Leow for the plaintiffs submitted that the words "until the final determination of this suit" could be construed in a number of ways, that is to say, the suit could be withdrawn by the plaintiffs or may be struck out on the application of the defendants for some reason or other or be determined after a hearing. In the present case the plaintiffs, he said, had not taken any other proceeding in the action after receipt of defence and they were therefore entitled to discontinue the action under Order 26 rule 1 without leave of the court.

After giving due consideration to the submissions advanced on behalf of the parties I am inclined to agree with Mr. Leow. Mr. Edgar Joseph is I think quite right in his interpretation of the words "final determination" with reference to a hearing by a court of law but with respect I find myself unable to agree with him that the concluding phrase "until the final determination of this suit" in the order of court dated March 4, 1975 can have the effect of restricting the right of the plaintiffs to avail themselves of the clear provisions of Order 26 rule 1 which entitled them to discontinue their action against the defendants without leave of the court. The condition under which the plaintiffs could discontinue without leave of the court had been satisfied, namely, that after receipt of defence the plaintiffs had not taken any other proceeding in the action except for the interlocutory application of January 23, 1975 which in any event did not affect their right to discontinue without leave. Leave of the court is necessary only where a plaintiff after receipt of defence takes any other proceeding in the action save any interlocutory application. The case of *Fox* v. *Star Newspaper Company, supra* was on different ground. There the action for libel was ready for trial, the jury had been sworn and the pleadings had opened and it was only then that the plaintiff sought to be nonsuited. The parties in the present case were a good distance apart, the action had no where reached the stage at which they were meeting face to face and if at a certain stage the rules provided for the discontinuance of their action which they considered not worth their while to contest the plaintiffs were perfectly entitled to take advantage of those rules.

In the circumstances therefore I hold that the plaintiffs' discontinuance of their action against the defendants without leave of the court is not in breach of Order 26 rule 1 of the Rules of the Supreme Court. In the light of this decision on the first prayer in the application I find it unnecessary to decide on the second prayer seeking leave to file a counterclaim. The application is dismissed with costs.

Application dismissed.

Solicitors: *Gunaretnam & Co.; Shearn, Delamore & Co.*

CHOO KIM SAN v. MALAYSIA BORNEO FINANCE CORPN. (M) BHD. & ANOR.

[O.C.J. (Mohamed Azmi J.) April 29, 1975]
[Kuala Lumpur — Civil Suit No. 931 of 1974]

Practice and Procedure — Affidavit — Cross-examination of deponent — R.S.C., 1957, O.38 r.1.

In this case the question arose as to the proper procedure to be adopted for requiring a deponent to be cross-examined under O.38 r.1. It was contended on a preliminary point that the procedures of serving a notice of intention to cross-examine deponent and making oral application to the court for that purpose as adopted by the second defendant in this case was not proper.

Held: the necessity for a summons for leave to cross-examine on affidavits and for an order to produce a deponent only applies to trial by affidavits. In other cases the order for attendance of a deponent for cross-examination can be granted by the court on oral application of any part after notice of intention to cross-examine deponent has been served.

CIVIL SUIT.

Raja Abdul Aziz bin Raja Addruse (*R. R. Sethu* with him) for the plaintiff.

Ng Chen Kiat for the first defendant.

Kok Wee Kiat for the second defendant.

Mohamed Azmi J.: This is an application by the plaintiff by Summons-in-Chambers dated September, 2, 1974 for liberty to sign final judgment against the defendants. In support of the application, the plaintiff filed two affidavits whilst his solicitor affirmed one affidavit. The application is opposed by the defendants vide affidavits affirmed by Huang Heng Chuen, General Manager of the first defendant; Yap Ping Kon, Secretary of the second defendant, and Raja Azam, the former Chairman of the second defendant. Notice of Intention to cross-examine two of the deponents, *viz.* the plaintiff and Raja Azam, were issued by the second defendant and served on the respective deponents or their solicitors.

In the other Summons-in-Chambers dated October 10, 1974, the second defendant applies to set aside the plaintiff's action on the ground that the address of the plaintiff indorsed in the Specially Indorsed Writ is illusory or fictitious; or, alternatively, for the plaintiff to give security for the second defendant's costs of the action.

When both applications came before me, counsel for the second defendant applied under Order 38 rule 1 of the Rules of the Supreme Court to cross-examine the plaintiff in respect of the second defendant's application. Although Notice of Intention to cross-examine the plaintiff has been issued and served on the deponent in respect of the plaintiff's application, no such Notice has been served in respect of the second defendant's application.

In this case, learned counsel for the plaintiff has raised a preliminary point in respect of the proper procedure to be adopted for requiring a deponent to be cross-examined under Order 38 rule 1. It is his contention that the procedure of serving Notice of Intention to cross-examine deponent and making oral application to court for that purpose as adopted by the second defendant in the present case is not proper. Whilst admitting that our Rules of Supreme Court do not provide any particular procedure, he contends that for the purpose of requiring attendance of a deponent for the purpose of cross-examination, an application